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No. ____

In the Supreme Court of the United States

FRED DECKER, ALBERTA BRYANT,
DIANA EVANS, AND CHARLES SAUVIE,
Petitioners,

v.

BILL BRADBURY, SECRETARY OF STATE OF OREGON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether Oregon's multi-day unrestricted vote-by-mail system irreconcilably conflicts with the federal election day statutes, 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1, which establish "the Tuesday next after the First Monday in November" as "the day" for the election of representatives and senators and the appointment of presidential electors.

2) Whether Oregon's multi-day unrestricted vote-by-mail system is preempted because it interferes with the means (single-day voting) chosen by Congress to combat voting fraud in federal elections.

PARTIES TO THE PROCEEDING

With the exception of The Voting Integrity Project, Inc., which was a party below but is not a petitioner in this Court, the parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding: Petitioners Fred Decker, Alberta Bryant, Diana Evans, and Charles Sauvie; and Respondent Bill Bradbury*, Secretary of State of Oregon.

* When this lawsuit was filed, the Secretary of State of Oregon was Phil Keisling. Mr. Keisling left office subsequent to the submission of this case to the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Fred Decker, Alberta Bryant, Diana Evans, and Charles Sauvie respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported as *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169 (9th Cir. 2001), and reprinted in the Appendix ("App.") at 1-16. The decision of the Court of Appeals affirmed the District Court's decision, which is unreported but is

available online as *Voting Integrity Project, Inc. v. Keisling*, 1999 U.S. Dist. LEXIS 22727 (D. Or. Mar. 22, 1999), and is reprinted at App. 17-30.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit entered its judgment and opinion on July 11, 2001. The Ninth Circuit denied a petition for panel and *en banc* rehearing on August 28, 2001. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The United States Constitution, Article I, Section 4, clause 1, provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The United States Constitution, Article II, Section 1, clause 4, provides:

> The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

2 U.S.C. § 1 provides:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next.

2 U.S.C. § 7 provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

3 U.S.C. § 1 provides:

> The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

Act of May 23, 1872, ch. CXCVIII, 17 Stat. 157, provides:

> Be it enacted by the Senate and House of representatives of the United States of America in Congress assembled, That if by the now existing

laws of any State the election commencing on the Tuesday next after the first Monday in November, eighteen hundred and seventy-two, for the purpose of choosing electors of President and Vice-President in such State shall be required to be continued for more than one day, then said election shall be continued the number of days required by the laws of such States.

Oregon Revised Statutes § 254.465(1) provides:

> An election held on the date of the biennial primary or general election shall be conducted by mail.

Oregon Revised Statutes § 254.470 provides:

> (1) Notwithstanding ORS 254.465 (1), at each biennial primary election and general election, the county clerk shall maintain voting booths in the county as follows:
>
> > (a) In each county with 35,000 or more electors in the county, the county clerk shall maintain a number of voting booths equal to at least one voting booth for every 20,000 electors in the county; and
> >
> > (b) In each county with fewer than 35,000 electors in the county, the county clerk shall maintain at least one voting booth.
>
> (2) The county clerk may determine the location of the voting booths required under this section.

(3)

(a) Except as provided in paragraphs (b), (c) and (d) of this subsection, the county clerk shall mail by nonforwardable mail an official ballot with a return identification envelope and a secrecy envelope not sooner than the 18th day before the date of an election conducted by mail and not later than the 14th day before the date of the election, to each active elector of the electoral district as of the 21st day before the date of the election.

(b) Notwithstanding paragraph (a) of this subsection, if the county clerk determines that an active elector of the electoral district as of the 21st day before the date of the election does not receive daily mail service from the United States Postal Service, the county clerk shall mail by nonforwardable mail an official ballot with a return identification envelope and a secrecy envelope to the elector not sooner than the 20th day before the date of an election conducted by mail and not later than the 18th day before the date of the election.

(c) Notwithstanding paragraph (a) of this subsection, the Secretary of State by rule shall specify the date on which all ballots shall be mailed for any state election conducted by mail under ORS 254.465 (2).

(d) Notwithstanding paragraph (a) of this subsection, in the case of ballots to be mailed to addresses outside this state to electors who

> are not long-term absent electors, the county clerk may mail the ballots not sooner than the 29th day before the date of the election.

42 U.S.C. § 1973aa-1 provides, in pertinent parts:

> (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections: (1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President; (2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines; (3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution; (4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote; (5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and (6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.
>
> (b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the

enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

STATEMENT OF THE CASE

I. Oregon's Unrestricted Multi-Day Vote-by-Mail System

Oregon has adopted a novel procedure that allows all voters to vote by mail for a substantial period of time prior to election day. App. 4. Early voting under this system is unrestricted. Indeed, it is encouraged, because the number of polling places around the state on federal election day has been sharply reduced, and voters might have to travel some distance in larger counties to vote at the few open polling places on election day.

In the 2000 federal general election, Oregonians voted by mail during a three-week period under the new system. Approximately eighty percent (80%) of the votes cast in Oregon's election for presidential electors were cast prior to the federal election day.[1] Oregon's vote-by-mail experiment contributed to the chaos of the 2000 presidential election, as final results in Oregon were not known for weeks. *See, e.g.*, Jim Carlton, *Election 2000: As Oregon's Vote by Mail Melted Down, Its Creator Was Elsewhere*, WALL STREET J., Nov. 14, 2000, at A19.

II. The District Court Proceeding

On November 4, 1998, the day after Oregon voters approved a ballot initiative establishing a system of voting by mail in Oregon elections, the Voting Integrity Project, Inc. ("VIP") and four Oregon voters commenced this action in the U.S. District Court for the District of Oregon

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[1] *See* Respondent's Internet web site at: http://www.sos.state.or.us/elections/nov72000/other.info/g00cum.htm

for declaratory and injunctive relief against Phil Keisling, who was then Oregon's Secretary of State. Their complaint challenged the new Oregon vote-by-mail system as it operates in federal elections on the basis that federal statutes from 1845 (3 U.S.C. § 1) and 1872 (2 U.S.C. §§ 1, 7) (the "federal election day statutes") establish a single day for voting in presidential and congressional elections.

After the parties cross-moved for summary judgment, the district court granted summary judgment to the State on March 22, 1999. The district court reasoned that that the term "appoint" in 3 U.S.C. § 1 (requiring that states appoint presidential electors on federal election day) only required that votes be *tallied* on election day, and did not require actual voting on election day. App. 24. With respect to 2 U.S.C. §§ 1 and 7, the district court held that allowing early voting did not change "the day for the election" within the meaning of those statutes, because "[i]f it did, then all state absentee balloting laws would be preempted by federal law." App. 25.

III. The Ninth Circuit Decision

VIP appealed to the U.S. Court of Appeals for the Ninth Circuit, which heard argument on September 13, 1999, and ruled on July 11, 2001. The Ninth Circuit's decision, authored by Judge Andrew Kleinfeld and joined by Judges William Fletcher and Ruggero Aldisert, affirmed the district court's grant of summary judgment to the State but applied an entirely different rationale. App. 1-16. Writing for the court, Judge Kleinfeld called this a "difficult case." App. 13.

A. The Ninth Circuit's Acknowledgment that the Federal Election Day Statutes Standing Alone Limit Voting to a Single Day

The Ninth Circuit acknowledged the force of the petitioners' contention that both the text and legislative history of the federal election day statutes demonstrate that Congress intended to confine voting in federal elections to a single day. App. 6 ("[T]his textual argument has considerable force"); App. 7 (noting that legislative history shows that "it is plain that Congress considered and rejected the practice of multi-day voting allowed by some states"); App. 13 ("[W]hat we have so far is a statute that, taking the text and its history by themselves, seems to imply that multi-day elections are not permitted."); App. 15 ("[W]e have one statute that may reasonably be construed to mean that all voting in federal elections should take place on a single day. The legislative history supports that interpretation.").

B. The Ninth Circuit's Treatment of *Foster v. Love*

The Ninth Circuit suggested, however, that this Court's opinion in *Foster v. Love*, 522 U.S. 67 (1997), may cut in favor of upholding Oregon's vote-by-mail statutes. In *Foster*, the Court struck down Louisiana's open primary scheme, under which all candidates for House and Senate ran together in a primary in October. If a candidate won a majority of the votes, the candidate was elected. *Id.* at 70. If no candidate won a majority, a run-off between the top two candidates was held on federal election day. *Foster* defined "election" for the purposes of the federal election day statutes as "the combined actions of voters and officials meant to make a final selection of

an officeholder." *Id.* at 71. In the Ninth Circuit's view, that

> definition cuts in favor of the Oregon law, because in Oregon the "final selection" cannot be made until the federal election day, while in Louisiana, it could be and ordinarily was made prior to federal election day.

App. 12.

The Ninth Circuit found that the "*Foster* definition of 'election' implies that there is only a single election day in Oregon, when the election is 'consummated,' even though there are prior voting days." App. 13. "Nevertheless," the panel emphasized, "*Foster* decided a different question, so its answer may not be controlling." *Id.* The panel conceded, in other words, that *Foster* did *not* require that the Oregon laws be upheld, because the issue of whether a state can *begin* an election before federal election day was not before the Court in *Foster*, which only involved the issue of whether states could *conclude* federal elections prior to election day.

C. The Ninth Circuit's "Reconciliation" of the Federal Election Day Statutes with Congressional "Tolerance" of Absentee Voting Practices and the Voting Rights Act Amendments of 1970

What ultimately persuaded the Ninth Circuit to uphold the Oregon multi-day vote-by-mail scheme, despite the scheme's apparent conflict with the federal election day statutes standing alone, was "the long history of

congressional tolerance, despite the federal election day statute, of absentee balloting and express congressional approval of absentee balloting when it has spoken on the issue." App. 13. The Ninth Circuit found "it difficult to reconcile a decision rejecting the Oregon law with the maintenance of absentee balloting." *Id.*

Citing the 1970 Voting Rights Act Amendments, 42 U.S.C. § 1973aa-1 (the "VRAA"), the Ninth Circuit stated that "Congress has recently required, not just allowed, states to provide absentee voting in federal elections." App. 14. The panel noted that the federal requirement for absentee voting is limited to "duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held." *Id.* The panel continued:

> By itself, this provision might be taken to imply that absence from the district on election day is a prerequisite for absentee voting. But Congress expressly prohibited that restrictive inference. It provided that "[n]othing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein." The "section" referred to is 1973-aa-1, which speaks to residence requirements for voting, registration, and absentee voting. The "less restrictive voting practices" allowed by the section would then include less restrictive absentee voting practices.

Id. (quoting 42 U.S.C. § 1973aa-1(g)). The Ninth Circuit also observed that the congressional findings of fact in the

statute say that "lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections" denies or abridges citizens' rights. *Id.* (citing 42 U.S.C. § 1973aa-1(a)).

The Ninth Circuit concluded that the federal election day statutes "may be reasonably construed to mean that all voting in federal elections should take place on a single day. The legislative history supports that interpretation." App. 15. The VRAA, however, "plainly provides for liberality toward absentee balloting." *Id.* The Ninth Circuit recognized that it had "a duty to construe statutes harmoniously where that can reasonably be done." *Id.* The court decided that it could only construe the federal election day statutes and the VRAA harmoniously if it used the "final selection" definition of "election" from *Foster* to declare that Oregon is in compliance with the federal election day statutes, *id.*, even though it had recognized previously that *Foster* decided a different question and may not be controlling. App. 13.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Failed to Recognize the Irreconcilable Conflict Between the Oregon Vote-by-Mail System and the Federal Election Day Statutes.

A. Congress Enacted the Federal Election Day Statutes to Confine Voting to a Single Day as a Means to Combat Election Fraud.

In 1845, Congress enacted a statute now codified as 3 U.S.C. § 1, which provides: "The electors of President and Vice President shall be appointed, in each State, on the

Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." Congress required that "'time must be uniform in the states'" as a means to combat election fraud in presidential elections. App. 7 (citing CONG. GLOBE, 28th Cong., 2d Sess. 15 (1844)); *see also* R. MORTON & K. WILLIAMS, LEARNING BY VOTING: SEQUENTIAL CHOICES IN PRESIDENTIAL PRIMARIES AND OTHER ELECTIONS, at chap. 1 (2001) (noting that 3 U.S.C. § 1 was enacted in response to abuses in the presidential election of 1840, in which "hordes of voters, having cast ballots in their home states, crossed into neighboring states with later election days and voted a second time").

In 1872, the Forty-Second Congress amended 3 U.S.C. § 1 to permit, in the presidential election of 1872 *only*, states to hold their polls open for several days (as opposed to a single day). *See* Act of May 23, 1872, ch. CXCVIII, 17 Stat. 157, reprinted at 3-4, *supra*. Although not codified in the United States Code, this special statutory exception to 3 U.S.C. § 1 remains part of the Statutes at Large and provides context to the meaning of 3 U.S.C. § 1.[2]

In 1872, the Forty-Second Congress also aligned the date of congressional elections with presidential elections by enacting 2 U.S.C. § 7, which provides that in every state, "the Tuesday next after the 1st Monday in November, in every even numbered year, is established as

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[2] Where there is a conflict between the Statutes at Large and the United States Code, the former prevails. *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).

the day for the election" for representatives to Congress. 2 U.S.C. § 7 (emphasis added).

The principal sponsor of 2 U.S.C. § 7 explained that one of the purposes of the act was to have a single uniform day for voting in congressional and presidential elections. *See* CONG. GLOBE, 42d Cong., 2d Sess. 112 (1871) (remarks of Rep. Butler) ("*[O]n the day when one votes all should vote*, and . . . the whole question should be decided then.") (emphasis added). He further explained that a single uniform day for voting in federal elections would serve the purpose of combating election fraud. App. 8 (citing CONG. GLOBE, 42d Cong., 2d Sess. 112).

When the Forty-Second Congress considered the legislation that became 2 U.S.C. § 7, it was aware that Texas then allowed *four days* for balloting in congressional elections because Texas law required voting at the county seat, and "it would be impracticable for all the voters of the county to go to the county seat and vote on one day." CONG. GLOBE, 42d Cong., 2d Sess. 676 (1872) (remarks of Sen. Trumbull). Because of this situation in Texas, an amendment to 2 U.S.C. § 7 was proposed that would have allowed Texas and other states to have multiple-day balloting. The Forty-Second Congress rejected the amendment, in part because the new legislation would not take effect until 1876, and Texas would have four years to restructure its election system to conform to federal law, and in part because of concerns over opportunities for election fraud inherent in multi-day voting:

> Whenever you provide that elections shall take place upon the same day, *you do interpose a not inconsiderable check to*

> *fraud in elections, to double voting, to the transmission of voters from one State to another. . . .*

App. 9 (emphasis added) (citing CONG. GLOBE, 42d Cong., 2d Sess. 618 (1872).

Following ratification of the Seventeenth Amendment (providing for the direct election of senators), Congress designated federal election day as the uniform national election date for senators. *See* 2 U.S.C. § 1. By aligning the election of senators under this section with the election date for representatives, a date that Congress had previously designated for presidential elections, Congress linked *all* federal elections and required such elections to be held "*on a single day throughout the Union.*" *Foster*, 522 U.S. at 70 (1997) (emphasis added).

B. The Oregon System Interferes with the Method Chosen by Congress to Combat Election Fraud and Is Therefore Preempted.

Preemption results if state law "interferes with the *methods* by which the federal statute was designed to reach [its] goal." *Int'l Paper Co. v. Ouellette*, 439 U.S. 481, 494 (1987) (emphasis added); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881-82 (2000). Because the Oregon system interferes with the method chosen by Congress to combat election fraud, i.e., single-day voting, the Oregon system is necessarily preempted. *See also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating that preemption results when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

C. As the Ninth Circuit Acknowledged, Standard Canons of Statutory Construction Confirm that the Federal Election Day Statutes, Standing Alone, Confine Voting to a Single Day.

The relevant federal statutes (2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1) do not define the term "election." When a statutory term is undefined, it must be interpreted "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). In *Meyer*, this Court looked to *Black's Law Dictionary* to ascertain the ordinary or natural meaning of an undefined statutory term. *See Meyer*, 510 U.S. at 476. *Black's* defines "election" as "the expression *by vote* of the will of the people." BLACK'S LAW DICTIONARY 518 (6th ed. 1990) (emphasis added). Similarly, the 1869 *Webster's American Dictionary of the English Language* relied upon by this Court in *Foster*, 522 U.S. at 71, defines "election" as "the act of choosing a person to fill an office or employment, by any manifestation of preference, *as by ballot*" (emphasis added). Thus, there can be no dispute that the plain and ordinary meaning of the word "election" means *voting* to select an officeholder.

Thus the federal election day statutes mean "voting" when they refer to "election." The next question of statutory construction is whether federal election day is the *exclusive* day of the election, and thus voting. This question is answered by the *expressio unius* canon of statutory construction, which holds that when "'a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (quoting *Botany Worsted Mills v. United*

States, 278 U.S. 282, 289 (1929)). Under the *expressio unius* principle, by designating federal election day as *the* day for the election, Congress *prohibited* holding the election on any other day or days.

In sum, there can be no serious dispute that the text of the federal election day statutes, standing alone, limits voting in federal elections to a single day. As the Ninth Circuit conceded, "this textual argument has considerable force." App. 6.

D. The Ninth Circuit Decision Conflicts with This Court's Decision in *Crosby* Because It Attaches Significance to Congressional *Inaction*.

Not withstanding the plain text of the federal election day statutes, the Ninth Circuit concluded that that Oregon's multi-day voting system did not conflict with these statutes because, *inter alia*, Congress has shown "tolerance" for absentee voting by failing to take measures to curb it through express preemption. App. 13-14.

The Ninth Circuit plainly erred in attaching significance to Congress's failure to expressly preempt absentee and early voting systems of which it was aware. Recently, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), this Court rejected an identical argument that Congress's failure to curb – through express preemption – practices of which it was aware implied approval of those practices for purposes of determining whether such practices conflicted with federal law. *See id.* at 388 ("The State's inference of congressional intent is unwarranted here, therefore, simply *because the silence of Congress is ambiguous*.") (emphasis added). By attaching

significance in a conflict preemption analysis to the inaction of Congress, the Ninth Circuit's opinion clearly conflicts with *Crosby*.

In short, Congress's failure to take action against practices of which it is aware has no bearing on whether such practices violate preexisting features of federal law, and the Ninth Circuit erred by deeming such inaction to be "tolerance."

E. The Ninth Circuit's "Reconciliation" of the Federal Election Day Statutes with the VRAA Conflicts with this Court's Presumption Against Implied Repeals.

The Ninth Circuit cited three provisions of the VRAA as evidence of congressional approval for absentee balloting and thus Oregon's multi-day vote-by-mail system:

1) Section 1973aa-1(d), which requires states to permit absentee balloting *in presidential elections* (the VRAA does not apply to congressional elections) for voters "who may be absent from their election district or unit in such State on the day such election is held." 42 U.S.C. § 1973aa-1(d);

2) Section 1973aa-1(g), a general saving clause that provides that "[n]othing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein." 42 U.S.C. § 1973aa-1(g); and

3) Section 1973aa-1(a)(1), a policy section that declares that "the lack of sufficient opportunities for absentee

registration and absentee balloting in presidential elections" deny voters their constitutional right to vote. 42 U.S.C. § 1973aa-1(a)(1).

None of these provisions can be read as impliedly repealing the federal election day statutes enacted in 1845 and 1872. Yet the Ninth Circuit effectively gave the VRAA precisely such a construction ostensibly in the name of "reconciling" the two statutory schemes. In doing so, it reached a result contrary to several holdings of this Court.

1. The VRAA Applies Only to *Presidential* Elections and Cannot Be Said to Affect 2 U.S.C. §§ 1 and 7, Which Govern the Timing of *Congressional* Elections.

The VRAA cannot be read to permit voting for *Senator or Representative* on a day other than federal election day. The Ninth Circuit determined that under the federal election day statutes, "all voting in federal elections should take place on a single day." App. 15. The Ninth Circuit found, however, that "another statute, of equal force, plainly provides for liberality toward absentee balloting." *Id.* But that "other statute," the VRAA, by its own terms applies only to "*presidential* elections." 42 U.S.C. § 1973aa-1(b) (emphasis added). The VRAA does not mandate that states provide citizens with the ability to vote by absentee ballot for candidates for *Senator or Representative*. It makes no findings or declarations with respect to congressional elections.

Even if the Court were to find that the enactment of the VRAA had the effect of permitting unrestricted voting by mail in *presidential* elections, voting by mail in

congressional elections, which the Oregon statutes provide for, would still be prohibited by 2 U.S.C. §§ 1 and 7. Because the VRAA does not "cover[ ] the whole subject" of 2 U.S.C. §§ 1 and 7, it cannot have any effect on them. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 157 (1976).

2. Section 1973aa-1(d) Creates a Limited Exception to the 1845 Federal Statute Governing Presidential Elections Rather than Impliedly Repealing It.

Section 1973aa-1(d) of the VRAA requires states to permit absentee voting in presidential elections for those voters who will be absent from their voting jurisdiction on election day. The Ninth Circuit decided that Section 1973aa-1(d) impliedly repealed 3 U.S.C. § 1. The court did not say that explicitly. Rather, it wrote that it was merely bringing the two statutes into harmony. App. 15. The court concluded, however, that while the federal election day statutes limit voting to a single day, the VRAA eliminated that restriction. In "harmonizing" two statutes, a court cannot simply obliterate the earlier one. Yet that is precisely what the Ninth Circuit did.

It is "a cardinal principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198 (1940). When there are two acts that address the same subject, the rule is to give effect to both if possible. *Id.* It is

> not sufficient as was said by Mr. Justice Story in *Wood v. United States* "to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may

> be merely affirmative, or cumulative, or auxiliary." *There must be "a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy.*"

Id. at 198-99 (emphasis added and citations omitted); *see also Radzanower*, 426 U.S. at 157 (stating that when two statutes are in conflict, "[r]epeal [of the earlier statute] is to be regarded as implied only if necessary to make the [later Act] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.") (quoting *Silver v. N.Y. Stock Exchange*, 373 U.S. 341, 357 (1963)).

Put another way, "[w]here the later special or local statute is not irreconcilable with the general statute to the degree that both statutes cannot have a coincident operation, *the general statute will not be repealed, but the special or local statute will exist as an exception to its terms.*" SINGER, 1A SUTHERLAND'S STATUTORY CONSTRUCTION § 23.16 at 381 (5th ed. 1991) (emphasis added). The Ninth Circuit should have treated Section 1973aa-1(d) as a limited exception to the general rule of 3 U.S.C. § 1 that presidential elections be held on a single day. It is not necessary that 3 U.S.C. § 1 be wholly repealed in order to make Section 1973aa-1(d) work.

Rather than applying *Radzanower*'s "guiding principle to reconciliation of the two statutory schemes," 426 U.S. at 157, the Ninth Circuit applied a definition of "election" from a case, *Foster*. But as the court admitted, "*Foster* decided a different question, so its answer may not be controlling." App. 13. There can be no question,

however, that *Radzanower* controls and the failure of the Ninth Circuit to follow it was error.

3. The VRAA's Saving Clause Does Not Apply to or Limit the Preemptive Effect of the Federal Election Day Statutes.

The VRAA's general saving clause in § 1973aa-1(g) does not conflict with or otherwise limit the preemptive effect of the federal election day statutes. Section 1973aa-1(g) provides only that "nothing *in this section*" shall bar states from adopting less restrictive voting practices. On its face, therefore, Section 1973aa-1(g) has no bearing on the preemptive effect of *other* federal statutes.

This Court has held repeatedly that saving clauses that are restricted to a particular statute cannot be read to limit the preemptive effect of entirely different federal statutes. *See United States v. Locke*, 529 U.S. 89, 106 (2000) (holding that saving clause explicitly limited to "this Act" did not "alter the pre-emptive effect" of entirely different Act of Congress); *Ouellette*, 479 U.S. at 493 (holding that saving clause restricted to "*this section*" did "not purport to preclude preemption of state law by other provisions of the Act") (emphasis by the Court). In *Locke* this Court emphasized that "[w]e decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106.

In deciding *Locke*, the Court reversed a decision by the Ninth Circuit declining to give preemptive effect to an earlier federal statute based on the saving clause contained in a later federal statute. *Id.*, *rev'g Int'l Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1062 (9th Cir.

1998). By construing the VRAA's general saving clause in § 1973aa-1(g) to limit the preemptive effect of the federal election day statutes, the Ninth Circuit has ignored this Court's decision in *Locke*.

4. The VRAA's General Policy Statement Does Not Have Independent Force.

The Ninth Circuit construed the VRAA's policy statement in § 1973aa-1(a)(1) that the lack of absentee voting opportunities denies citizens the right to vote in presidential elections as an affirmative limitation on the preemptive effect of the federal election day statutes. That conclusion, however, is at odds with the rules of statutory construction.

As a policy section,[3] § 1973aa-1(a)(1) has the same effect as a preamble and therefore "is not part of the substantive portion of the statute." SINGER, *supra*, § 20.12 at 97. Preambles to statutes do not impose substantive rights, duties, or obligations. *Nat'l Wildfire Fed'n v. Marsh*, 721 F.2d 767, 773 (11th Cir. 1983); *see also Ass'n of Am. Railroads v. Costle*, 562 F.2d 1310, 1318 (D.C. Cir. 1977). Thus, a preamble "cannot be given the effect of enlarging the scope or effect of a statute." SINGER, *supra*, § 20.03 at 83.

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[3] Sutherland explains that "in place of preamble, it has become common, particularly in federal legislation, to include a policy section which states the general objectives of the act so that administrators and courts may know its purposes." SINGER, 1A SUTHERLAND STATUTORY CONSTRUCTION § 20.12 at 97 (5th ed. 1991).

In sum, none of the VRAA provisions cited by the Ninth Circuit have the effect of totally repealing the federal election day statutes. The VRAA manifestly has no effect at all on 2 U.S.C. § 1 and 7, and at most creates a very limited exception to the general rule under 3 U.S.C. § 1 that voting in presidential elections must occur on federal election day.

F. The Ninth Circuit Misapplied *Foster v. Love.*

In *Foster*, this Court considered whether states could *conclude* congressional elections prior to federal election day. *See Foster*, 522 U.S. at 69 ("The issue before us is whether such an ostensible election runs afoul of the federal statute."). The question of whether states could *commence* federal elections prior to federal election day was not before the Court in *Foster* and was not explicitly or implicitly decided by *Foster*'s holding. Indeed, the Court stressed the narrowness of its holding:

> While true that there is room for argument about just what may constitute the final act of selection within the meaning of the law, our decision does not turn on any nicety in isolating precisely what acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute. Without paring the term "election" in § 7 down to the definitional bone, *it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take*

> *place on the date chosen by Congress, clearly violates § 7.*

522 U.S. at 72 (emphasis added). This Court then emphasized in a footnote that "[w]e hold today only that if an election does take place, *it may not be consummated prior to federal election day.*" *Id.* at 72 n.4 (emphasis added).

The Ninth Circuit erroneously treated this careful qualification to the Court's holding as an implicit endorsement of early voting, so long as some voting occurs on election day:

> The Supreme Court has provided the device for reconciling the federal election day statute and the federal absentee voting statute: a definition of "election" that treats election day as the "consummation" of the process rather than any day during which voting takes place. Given that definition, and the force of the absentee voting statute, Oregon is in compliance with the federal election day statute. Although voting takes place, perhaps most voting, prior to election day, the election is not "consummated" before election day because voting still takes place that day.

App. 15.

Far from endorsing any election practice that provided for voting in advance of election day, so long as some voting occurs on election day, the Court in *Foster* only held that an election *prior* to election day, with no acts to

occur on election day, violated the statute. *Foster* did not decide, one way or another, whether voting in advance of election day is permissible when coupled with voting on election day.

Indeed, if anything, *Foster* contains language that supports the proposition that voting is confined to a single day. *See, e.g.*, 522 U.S. at 69-70 (noting that the federal election day statutes mandate "holding all elections for Congress and the Presidency *on a single day* throughout the Union") (emphasis added); *id.* at 71 (defining "election" as the "combined actions of *voters* and officials meant to make a final selection of an officeholder") (emphasis added); *id.* at 72 (stating that the federal election day statutes establish "a particular day as '*the day' on which these actions take place*") (emphasis added); *id.* at 73-74 (noting that legislative history of Section 7 shows congressional concern over "*distortion of the voting process*" caused by voting at different times in federal elections) (emphasis added).

II. The Circuits and Lower Federal Courts Are in Disarray over the Meaning and Effect of the Federal Election Day Statutes, this Court's Decision in *Foster v. Love*, and Whether, and to What Extent, States Must Provide for Voting on Election Day.

The Ninth Circuit is not alone in holding that federal law permits multi-day voting. The Sixth Circuit recently upheld unrestricted in-person early voting in Tennessee, and the Fifth Circuit approved a similar system in Texas. *See Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773 (5th Cir.), *cert. denied*, 530 U.S. 1230 (2000). Although the

courts of appeals' decisions reach the same result, they are in utter disarray as to their reasoning. For example:

- The Ninth Circuit acknowledged the force of Petitioners' textual argument that 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1 limit voting to a single day.[4] The Fifth Circuit found no textual support for this argument. *See Bomer*, 199 F.3d at 776. The Sixth Circuit found the text of the federal statutes to be ambiguous and referred to the legislative history to ascertain the meaning of "election." *See Millsaps*, 259 F.3d at 541. After reviewing the legislative history, the Sixth Circuit conceded that the relevant legislative history supported the petitioners' construction of the statutes, *see id.* at 547 (recognizing that legislative history of the federal election day statutes suggests that Congress intended to establish a single day for voting), but held that it was bound by *Foster* and that *Foster* permitted early voting. *See id.* ("In light of the importance of congressional intent to preemption analysis . . ., we acknowledge that the remarks of Representative Butler and Senator Trumbell lend support to the plaintiffs' interpretation of the statute," but "we are bound by *Foster's* definition of election in these statutes.") (citations omitted).

- The Sixth Circuit found that *Foster v. Love* controls the question presented in the instant case. *Millsaps*, 259 F.3d at 547. The Ninth Circuit determined that

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[4] *Accord In re Absent Voters Law*, 80 N.H. 595, 113 A. 293 (1921) (declaring an absentee voting bill preempted by 2 U.S.C. §§ 1 and 7 and stating that " [i]f the election is to be held on a certain day, the implication is that the vote must be cast on that day.").

Foster was may *not* be controlling because it decided a different question. App. 13. The Fifth Circuit seemed to acknowledge that *Foster* is not controlling, but then interpreted *Foster*'s qualification to its holding as a "signal" to predict how this Court *would* rule. *Bomer*, 199 F.3d at 776.

- The district court in *Bomer* held that the mere tallying of votes constituted an "election" within the meaning of the federal election day statutes. *See Voting Integrity Project, Inc. v. Bomer*, 61 F. Supp. 2d 600, 604 (S.D. Tex. 1999). The district court in this case held the same with respect to 3 U.S.C. § 1. *See* App. 24. The Fifth Circuit in *Bomer* did not reject the reasoning of the district court in that case, and the Ninth Circuit in this case did not repudiate the holding of the district court in this case that voting in presidential elections can be completely decoupled from election day.

- The Ninth Circuit ultimately upheld Oregon's vote-by-mail system even though it conceded that under the Oregon system, "most voting" may take place prior to election day. App. 15. But the Fifth Circuit's decision implies that although Texas' system does not conflict with the federal election day statutes, *Oregon*'s system might be invalid because under the Oregon system, the majority of votes are cast *prior* to election day. *See Bomer*, 199 F.3d at 776 (upholding Texas system in part because the majority of votes in Texas are cast *on* election day). Meanwhile, the Sixth Circuit upheld the Tennessee system based in part on the rationale that under that system, "considerable voting continues to take place on election day itself." *See Millsaps*, 259 F.3d at 546.

This last conflict between the circuits' opinions is very significant to policymakers charged with election reform. If Maryland, for example, wanted to adopt a vote-by-mail system identical to Oregon's, should it look to the Ninth Circuit, the Fifth Circuit, or the Sixth Circuit? The Fifth Circuit upheld Texas' system in part because the majority of citizens still voted on election day. *Bomer*, 199 F.3d at 776. The implication of this reasoning is that a vote-by-mail system like Oregon's might be invalid under the Fifth Circuit's decision in *Bomer*, because eighty percent of Oregon's voters cast their ballots by mail in 2000.

Moreover, can a state comply with the federal election day statutes by eliminating voting entirely on federal election day, so long as the votes are tallied on that day? Under the district court's decision as affirmed by the Ninth Circuit, states can do just that. The result could be attempts by states to conduct presidential voting in September or October, with only vote tallying to occur on federal election day.

If States are to embark on electoral reform, they need this Court to provide a uniform answer to the question of whether federal law requires that all voting occur on a single national election day, and if not, precisely what acts must take place on that day and what acts may occur beforehand. This is precisely the circumstance in which the Court should grant the writ. *See, e.g.*, *Barrett v. United States*, 423 U.S. 212, 215 (1976) (stating that certiorari was granted because of the importance of the issue and because the court of appeals decision "appeared to have overtones of conflict" with another circuit's decision).

III. This Case Involves a Question of Exceptional National Importance.

A. Resolving This Case is Crucial for Election Reform, Especially as it Bears on Election Integrity.

This case presents the Court with the opportunity to resolve the unsettled question of whether Oregon's system of unrestricted early voting by mail is permissible under federal election law. The crucial importance of the issue in this case, especially in the wake of controversies surrounding the 2000 presidential election, was underscored recently by the release of the report of the National Commission on Federal Election Reform, which was co-chaired by former Presidents Ford and Carter. Most notably for purposes of this case, the Commission addressed "the increasing adoption of procedures that encourage 'no excuse' absentee voting, early voting, and voting-by-mail" and termed this trend troubling.[5] In particular, the Commission noted that

> *Federal law states that presidential elections should be held on the same day throughout the nation.* Courts nonetheless have understandably been reluctant to invalidate state laws on this basis. *But we believe the statutory plan offers wise guidance.*

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[5] *See* National Commission on Election Reform, *To Assure Pride and Confidence in the Election Process*, at 43-44 (released July 31, 2001). The report can be found at http://www.reformelections.org/data/reports/99_full_report.pdf.

Id. at 43 (emphasis added).

The Commission enumerated a number of concerns about unrestricted early voting, some of which are identical to those Congress cited in adopting the federal election day statutes. The Commission wrote:

- Citizens should vote with a common base of information about candidates. If they vote over a period of weeks before Election Day, they vote based on the knowledge available on a smattering of different days.

- Wherever possible, citizens should vote alone and in secret. The United States adopted a secret ballot centuries ago to help voters resist pressure to disclose their choices, whether to relatives or to interested "friends." Permissive early voting threatens the hard won right to a secret ballot.

- The institution of a national Election Day is one of the only remaining occasions in which Americans come together as a nation to perform a collective civic duty. We think rituals and ceremonies do have a part in forming a nation's traditions and habits. We think this should not be discarded lightly.

- *Growing use of absentee ballots has turned this area of voting into the most likely opportunity for election fraud now encountered by law enforcement officials.* These cases are

> especially difficult to prosecute, since the misuse of a voter's ballot or the pressure on voters occurs away from the polling place or any other outside scrutiny. These opportunities for abuse should be contained, not enlarged.

Id. at 44 (emphasis added).

This last point bears special emphasis, as it demonstrates that one of Congress's objectives in enacting the federal election day statutes – the suppression of election fraud – has been undermined by the recent emergence of unrestricted early voting, and especially early voting by mail as in Oregon.

The Commission acknowledged "how difficult it will be for states that have already adopted such practices to roll them back." However, the Commission concluded:

> We hope to do what we can to undermine the hitherto largely uncritical acceptance of this "convenient" trend and discourage states that have not yet traveled down this problematical path.

Id.

B. Unrestricted Early Voting and the Uncertainty Created by the Legal Issue in this Case Are Widespread.

The Commission's report was prepared in reaction to the many controversies surrounding the 2000 federal elections, not just in Florida but elsewhere. Commenting on those same controversies, this Court implicitly advised

"legislative bodies nationwide" to examine the processes by which citizens vote. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). But legislatures cannot reform their election laws properly unless they understand the import of existing federal election laws and decisions of this Court. As they redraft their election codes, legislatures will consider more than dangling chads and antiquated voting machines; they will consider voting by mail and other forms of unrestricted early voting. They need to know whether or not those options are permissible under 2 U.S.C. §§ 1 and 7, 3 U.S.C. § 1, and this Court's decision in *Foster v. Love*. By assessing the legality of Oregon's vote-by-mail regime, this Court can better equip the States to take on the task of election reform that the Court itself urged upon them.

Moreover, the nation's – and the Court's – painful experience with the 2000 presidential election demonstrates that legal controversies over election laws and procedures are best settled *prospectively*, before votes are cast in the heat of an election. To the extent that this issue is not settled now, the possibility remains that it will resurface sooner or later as part of a *post*-election controversy over whether votes cast early are valid and should be counted.

Although only Oregon has adopted a pure vote-by-mail system, in the last three decades[6] some eighteen other states have some form of unrestricted early voting – in other words, voting on a day other than election day

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[6] While states began to provide for civilian absentee balloting for persons unable to vote on election day in the 1890's, no state permitted unrestricted absentee balloting until the 1970's.

without having to provide a reason or justification for voting early.[7] The result is a "patchwork of state [election times], undermining the uniformity and national character that the Framers envisioned and sought to ensure." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995). This patchwork of conflicting periods for the holding of federal elections bears out the warning of Publius that "[i]f

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[7] In addition to Oregon, unrestricted early voting exists in the following states: Alaska, *see* ALASKA STAT. § 15.20.010 (at least 15 days before election); Arizona, *see* ARIZ. REV. STAT. ANN. §§ 16-541 *et seq.* (at least 30 days before election); Arkansas, *see* ARK. CODE ANN. §§ 7-5-402, 7-5-418 (15 days before election); California, *see* CAL. ELEC. CODE § 3000 (29 days before the election); Colorado, *see* COLO. REV. STAT. ANN. § 1-7.5-108 (up to 55 days before the election); Florida, *see* FLA. STAT. ANN. § 101.657 (available to any registered voter who is "unavailable to attend the polls on election day" beginning up to 45 days before the election at the discretion of each county); Idaho, *see* IDAHO CODE § 34-1001 (at least 43 days before the election); Kansas, *see* KAN. STAT. ANN. §§ 25-119, 25-120 (20 days before election); Nebraska, *see* NEB. REV. STAT. §§ 32-808, 32-938 (at least 35 days before the election); New Mexico, *see* N.M. STAT. ANN. §§ 1-6-3, 1-6-5 (40 days before the election); North Dakota, *see* N.D. CENT. CODE § 16.1-07-01 (40 days before the election); Oklahoma, *see* OKLA. STAT. ANN. tit. 26, § 14-105 (30 to 45 days before the election); Tennessee, *see* TENN. CODE ANN. § 2-6-101 *et seq.* (20 days before the election); Texas, *see* TEX. ELEC. CODE §§ 81.001, 82.005, 85.001(a) (17 days before the election); Vermont, *see* VT. STAT. ANN. tit. 17, § 2531 (available to any registered voter who "expects to be an absent voter" for any reason at least 35 days before the election)Washington, *see* WASH. REV. CODE ANN. § 29.36.010 (45 days before the election); Wyoming, *see* WY. STAT. ANN. § 22-6-107, 22-9-101 (at least 40 days before the election).

each State may choose its own time of election, it is possible there may be at least as many different periods as there are months in the year." THE FEDERALIST NO. 61, at 413 (Alexander Hamilton) (J. Cooke ed. 1961).

As the Framers considered national uniformity in the time of federal elections to be a "positive advantage," *id.*, and as they equally feared "the States' abuse of the power to set the 'Times, Places, and Manner' of elections," *U.S. Term Limits*, 514 U.S at 808-09, they gave Congress "the final say" on the subject. *Foster*, 522 U.S. at 72. The Ninth Circuit's decision opens the door to further abuse of this power by the states and further balkanization of the timing of voting in federal elections.

This case involves an election system used, in one variation or another, by at least nineteen states. It implicates the very important federal interest of preventing fraud in federal elections and preventing state abuse of the power to set the time of federal elections.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari and resolve these critical questions.

Respectfully submitted,

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Appendix

App. 1

VOTING INTEGRITY PROJECT, INC.,
FRED DECKER, ALBERTA BRYANT,
DIANA EVANS, AND CHARLES SAUVIE,
Plaintiffs-Appellants,

v.

PHIL KEISLING,
SECRETARY OF STATE OF OREGON,
Defendant-Appellee

No. 99-35337

259 F.3d 1169

United States Court of Appeals
for the Ninth Circuit

July 11, 2001

COUNSEL: M. Miller Baker, Charles Spies, and Richard B. Rogers, Carr Goodson Warner, Washington, D.C., for the appellant.

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Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General, Salem, Oregon, for the appellee.

JUDGES: Before: Ruggero J. Aldisert,[1] Andrew J. Kleinfeld, and William A. Fletcher, Circuit Judges. Opinion by Judge Kleinfeld.

KLEINFELD, Circuit Judge.

The issue in this case is whether state legislation allowing people to vote by mail over an extended period violates a federal statute requiring that the election shall be held on a particular day.

Voting Integrity Project, Inc. and several individuals brought a federal civil rights suit for declaratoryand injunctive relief,[2] to establish that an Oregon statute that allows Oregonians to vote by mail for a substantial period prior to or as well as on this federal election day violates the federal election laws. This case concerns only legal issues, and no facts are in dispute. The State of Oregon prevailed on summary judgment.[3] We have jurisdiction under 28 U.S.C. § 1291.

I. Federal law.

Federal statutes establish "the Tuesday next after the first Monday in November" as federal election day for the election of United States Representatives and Senators and

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[1] The Honorable Ruggero J. Aldisert, Senior Circuit Judge for the Third Circuit, visiting judge.

[2] The suit is pursuant to 42 U.S.C. § 1983, which provides for suits in federal court for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States.

[3] *See* FED. R. CIV. P. 56.

as the day on which "electors of President and Vice President shall be appointed."[4] Without question, Congress has the authority to compel states to hold these elections on the dates it specifies. The Constitution provides that:

> the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.[5]

Likewise, "Congress may determine the Time of chusing the Electors ..." for the electoral college.[6]

Until the 1840s, Congress left the actual conduct of federal elections to the diversity of state arrangements. In 1845, Congress provided that in presidential election years "the electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November."[7] n7 Further changes for the election of Representatives, Senators and the President and Vice President were legislated as part of Reconstruction in the 1870's. Congress provided that:

> the Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of

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[4] 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. The manner of appointment is now by popular election but was formerly by the legislatures of some states.

[5] U.S. CONST. art. I, § 4, cl. 1.

[6] U.S. CONST. art. II, § 1, cl. 3.

[7] 3 U.S.C. § 1.

> the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.[8]

Senators, of course, were not covered by this election day provision, because until the Seventeenth Amendment was ratified, they were selected by state legislatures, not elected. After ratification, Congress provided that they should be elected at the same time as Representatives were elected.[9]

The law remains the same today. The first Tuesday after the first Monday in November is the day when presidential and vice presidential electors "shall be appointed,"[10] and it is also "the day for the election" of Representatives and Senators.[11]

II. Oregon law.

Oregon law provides that elections "shall be held" the first Tuesday after the first Monday for federal and other offices.[12] But citizens do not necessarily vote on that day. Oregon has adopted a novel procedure of allowing all voters to vote by mail for a substantial period before election day. Oregon law now provides that the regular biennial elections "shall be conducted by mail."[13] The statute establishes an extended period, rather than a single

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[8] 2 U.S.C. § 7.
[9] 2 U.S.C. § 1.
[10] 3 U.S.C. § 1.
[11] 2 U.S.C. §§ 1, 7.
[12] OR. REV. STAT. § 254.056.
[13] OR. REV. STAT. § 254.465.

day, during which citizens may vote. County clerks must mail the blank official ballots to all registered voters between 14 and 20 days preceding the election.[14] Voters can mail the ballots back or deposit them at any time between when they receive them and election day.[15] Mailed ballots are counted only if they are received no later than election day,[16] so the scheme contemplates that they will be mailed prior to election day. Voting by mail does not require any certification that the voter will be out of the district on voting day or will be otherwise inconvenienced or unable to vote in person.[17]

A vestige of traditional voting days remains. Voters may vote the traditional way, by casting their ballots in person at a central location on voting day if they choose.[18] The Secretary of State must designate "places of deposit" for ballots, which must be kept open on voting day for at least eight hours and at least until 8:00 P.M.[19] Voters have the right to deposit their ballots at that place instead of mailing them in.[20] In addition to depositing a ballot at a "place of deposit," any voter may obtain a replacement ballot and cast it at the county clerk's office or one central location in the electoral district if the ballot mailed to them is destroyed, spoiled, lost, or never received.[21]

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[14] OR. REV. STAT. § 254.470(3)(a)-(b).
[15] OR. REV. STAT. § 254.470(8).
[16] *Id.*
[17] OR. REV. STAT. §§ 253.015, 253.030.
[18] Or. Rev. Stat. § 254.474.
[19] Or. Rev. Stat. § 254.470(2).
[20] Or. Rev. Stat. § 254.470(8).
[21] Or. Rev. Stat. §§ 254.470(2), 254.470(9).

III. Analysis.

We review the district court's grant of summary judgment de novo.[22]

Congress, exercising its authority under the Constitution,[23] has designated the first Tuesday after the first Monday in November as "the day for the election."[24] Appellant argues that under Oregon's new vote by mail statutes, much or most of the voting for these federal officials will now take place in Oregon prior to the day Congress has designated as "the day for the election,"[25] thereby violating the federal statute.

Appellant argues that by designating a federal election day, the first Tuesday after the first Monday in November, as "the day for the election," (emphasis added), Congress implied that the designated federal elections were to take place on that day and no other days. That is a fair inference from the text. The word "the" precedes "day," implying that the statute refers to a single day. This textual argument has considerable force.

Appellant further argues that the legislative history shows that Congress meant what the text implies. This argument also has force. We have studied the Congressional Globe (an earlier analogue of today's Congressional Record) to discover "what social problem Congress addressed with this statute more than [eleven]

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[22] See *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998).

[23] U.S. CONST. art. II, § 1, cl. 3; U.S. CONST. art. I, § 4, cl. 1.

[24] 2 U.S.C. § 7.

[25] *Id.*

decades ago."[26] We encounter all the usual problems of legislative history, such as not knowing whether those who spoke represented the views of those who did not speak. Some speakers dilute clarity with diplomacy, as can be expected of serious legislation trying to accomplish a serious purpose.

But it is plain that Congress considered and rejected the practice of multi-day voting allowed by some states. In the 1844 debates regarding selection of the electoral college, there was discussion on the floor of the Virginia practice, where "it frequently happened that all the votes were not polled in one day."[27] But the expense to some states of reforming the system was characterized as a "slight consideration in the decision of a matter of such momentous importance."[28] In the previous presidential election, "both parties [were] charging each other with having committed great frauds, and both professed to be anxious to guard against them in future."[29] It was argued that the "time must be uniform in the States."[30]

The intense 1871-72 debates became even more explicit in addressing multi-day voting. At this time, Reconstruction was drawing to an end, a federal amnesty program allowed many confederate soldiers to regain the right to vote,[31] the so-called Redeemers were winning

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[26] *Portland 76 Auto/Truck Plaza, Inc., v. Union Oil Co.*, 153 F.3d 938, 944 (9th Cir. 1998).

[27] Cong. Globe, 28th Cong. 2d. Sess. 15 (1844).

[28] *Id.* at 28.

[29] *Id.* at 29.

[30] *Id.*

[31] *See* ENCYCLOPEDIA OF AMERICAN HISTORY 250 (Richard B. Morris ed., 1953).

control of previously "reconstructed" southern states, and the Democratic Party was consequently drawing even with the Republican Party in national strength.[32] While the national election day was being considered in the House, a general amnesty bill for confederates was pending in the Senate,[33] and reapportionment of Representatives among the states was also being hotly debated.[34] The abolitionist leading debate said that the "object of this amendment is to provide a uniform time of electing Representatives in Congress."[35] He explained that a uniform day of election would address fraud "on account of the facility for colonization and repeating among the large central States, . . . the privilege is allowed the border states, in any man is so disposed, of throwing voters across from one into the other."[36] Though not mentioned during the debate, the anarchy and terrorism resulting from massive voting fraud in "Bleeding Kansas" by pro-Slavery voters from Missouri crossing the border to counter pro-abolition voters from New England could not have been so soon forgotten.[37]

At the time, different states elected members of the House of Representatives during different months.[38] Much concern was expressed about the inconvenience of changing state constitutions and laws to accommodate a

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[32] *See* SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 721-22 (1965).

[33] Cong. Globe 42d Cong., 2d Sess. 620 (1872).

[34] Cong. Globe 42d Cong., 2d Sess. 608 (1872).

[35] Cong. Globe 42d Cong., 2d Sess. 112 (1871).

[36] *Id.*

[37] *See* ALBERT D. RICHARDSON, BEYOND THE MISSISSIPPI 41 (1867).

[38] Cong. Globe, 42d Cong., 2d Sess. 138 (1871).

uniform national day.[39] Some argued that the diversity of dates "gives some states undue advantage," and "it gives some parties undue advantage,"[40] though a Senator from Maine remarked "we want in the future, as we have had in the past, the position of indicating to the country the first sentiment on great political questions."[41]

Congress expressly considered an amendment to continue to allow states "in which by law the polls are held open more than one day" to continue the practice.[42] Debate focused on Texas, a state then being reconstructed. Voting was allowed in Texas only at county seats, and polls were held open for four days. The stated purpose was so that all the voters could get there and be spread out enough so that there was time to accommodate all the voters.[43] Other southern states used the same practice.[44] The proviso would have allowed the practice to continue, with the national election day being the first day of the polls being open in those states.[45] But the argument for a uniform national day kept being repeated, along the lines of: "Whenever you provide that elections shall take place upon the same day, you do interpose a not inconsiderable check to frauds in elections, to double voting, to the transmission of voters from one State to another, and you do allow the people to vote for their Representatives

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[39] *Id.* at 138-39.
[40] *Id.* at 141.
[41] *Id.* at 116.
[42] Cong. Globe, 42 Cong., 2d Sess. 676 (1872).
[43] *See id.* at 610, 676.
[44] *See id.* at 610.
[45] *See id.*

undisturbed by considerations which they ought not to take at all into account."[46]

The most explicit language about multi-day voting came in response to an argument that "it is an impossibility for the voters to all get together on one day" because" they are remote from the polls."[47] One Representative gently suggested that Texas should "have a greater number of precincts."[48] But another said that multi-day voting was a device used to disenfranchise black voters:

> I desire to say that never until there was a change in the suffragans, never until the colored people became voters, did we ever have an election held in this country continue for more than one day.
>
> ....
>
> I never knew in the western country or in the eastern country any State where an election was required to be held in more than one day. Until this new element I shall not say what entered into our politics, it was never considered necessary that four, five, or six days should be allowed for the purpose of voting. Of course in Texas they have had three days for an election; and we had a beautiful illustration of that mode of voting in the contested-election case decided here yesterday. I do not propose to legalize any such proceeding by Federal legislation.[49]

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[46] *Id.* at 618.
[47] *Id.* at 3408.
[48] *Id.*
[49] *Id.* at 3408.

Ultimately, Congress rejected the provision to allow multi-day voting to continue so long as states provided for it by law.[50] Instead, it allowed multi-day voting to continue through the election of 1872, but not thereafter.[51] n51 Because Congress considered and rejected an amendment to allow multi-day voting when they enacted the uniform election day for Representatives in 1872, it is a fair inference that the word" the" in the statute was intended, after due consideration of multi-day voting, to reject it. "Few principles of statutory intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."[52]

Thus appellants have made substantial arguments from the text of the statute and the history of rejection of a bill that would have allowed multi-day voting. But there are also substantial arguments going the other way.

The Supreme Court decision most nearly on point cuts in favor of the Oregon law. *Foster v. Love* holds that a novel Louisiana scheme violates the federal election day statute,[53] but the way in which it so holds seems to imply that the Oregon statute does not. The Louisiana statute required all candidates for the United States Senate and the United States House of Representatives to run together in an open primary in October.[54] If a candidate won a

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[50] *Id.* at 676.

[51] Act of May 23, 1872, ch. CXCVII, 17 Stat. 157.

[52] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987).

[53] 522 U.S. 67, 69, 118 S. Ct. 464, 139 L. Ed. 2d 369 (1997).

[54] *See id.* at 70.

majority of the votes, that candidate was elected.[55] If no candidate won a majority, then there was a run-off on the federal election day.[56] The court held that Louisiana had provided for federal elections earlier than the federal election day, so the state law was violated by the federal statute.[57] The Court defined "election" for purposes of the federal election day statute as "the combined actions of voters and officials meant to make a final selection of an officeholder."[58] That definition cuts in favor of the Oregon law, because in Oregon the "final selection "cannot be made until the federal election day, while in Louisiana, it could be and ordinarily was made prior to the federal election day. The inference is strengthened by the Court's explanation that "it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates § 7."[59] A footnote to this passage emphasized that "this case does not present the question whether a State must always employ the conventional mechanics of an election. We hold today only that if an election does take place, it may not be consummated prior to federal election day."[60] In contrast with the Louisiana scheme, the Oregon scheme leaves the election "unconsummated" until the federal election day, with a residual ritual of in person voting at central election offices still to take place on that day.

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[55] *See id.*
[56] *See id.*
[57] *See id.* at 74.
[58] *Id.* at 71.
[59] *Id.* at 72.
[60] *Id.* at 72 n.4.

Thus what we have so far is a statute that, taking the text and its history by themselves, seems to imply that multi-day elections are not permitted. But we have a Supreme Court decision which we must follow, explaining that the word "election" means a "consummation" of the process of selecting an official, and emphasizing that it found a violation of the statute only because there was no act of officials or voters left to be done on federal election day. The Foster definition of "election" implies that there is only a single election day in Oregon, when the election is "consummated, even though there are prior voting days. Nevertheless Foster decided a different question, so its answer may not be controlling.

What persuades us of the proper outcome in this difficult case is the long history of congressional tolerance, despite the federal election day statute, of absentee balloting and express congressional approval of absentee balloting when it has spoken on the issue. We find it difficult to reconcile a decision rejecting the Oregon law with the maintenance of absentee balloting.

Absentee voting began during the Civil War as a means of providing soldiers the ability to vote.[61] Vermont became the first state to accord absentee voting privileges to civilians in 1896.[62] States have continued to provide for and expand absentee voting since.

Congress has recently required, not just allowed, states to provide for absentee voting in federal elections.[63] The absentee voting required is not like Oregon's. The congressional requirement of absentee voting is limited to "duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held."[64] By itself, this provision might be taken to imply that absence from the district on the election day is a prerequisite for absentee voting. But Congress expressly prohibited that restrictive inference. It provided that "nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein."[65] The "section "referred to is 1973aa-1, which speaks to residence requirements for voting, registration, and absentee voting. The "less restrictive voting practices" allowed by the section would then include less restrictive absentee voting practices. The congressional findings of fact in the statute say that "lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections" deny or abridge citizens' rights.[66]

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[61] *See De Flesco v. Mercer County Bd. of Elections*, 43 N.J. Super. 492, 129 A.2d 38, 40 (N.J. App. 1957).

[62] *Id.*

[63] 42 U.S.C. § 1973aa-1(d).

[64] *Id.*

[65] 42 U.S.C. § 1973aa-1(g).

[66] 42 U.S.C. § 1973aa-1(a)

Thus, we have one statute that may reasonably be construed to mean that all voting in federal elections should take place on a single day. The legislative history supports that interpretation. But another statute, of equal force, plainly provides for liberality toward absentee balloting. We are under a duty to construe statutes harmoniously where that can reasonably be done.[67]

The Supreme Court has provided the device for reconciling the federal election day statute and the federal absentee voting statute: a definition of "election" that treats election day as the "consummation" of the process rather than any day during which voting takes place. Given that definition, and the force of the absentee voting statute, Oregon is in compliance with the federal election day statute.[68] Although voting takes place, perhaps most voting, prior to election day, the election is not "consummated" before election day because voting still takes place on that day.

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[67] 2B SUTHERLAND STATUTORY CONSTRUCTION § 53.01 (5th Ed.).

[68] The Fifth Circuit reached the same conclusion regarding a Texas statute that allows voting to begin 17 days before federal election day. *See Voting Integrity Project Inc. v. Bomer*, 199 F.3d 773, 774, 777 (5th Cir. 2000).

IV. Conclusion.

We take no position on the desirability of one or another scheme for voting or absentee voting, only its legality. We only conclude that the Oregon scheme is in compliance with the federal election day statute.

AFFIRMED.

VOTING INTEGRITY PROJECT, INC., ET AL.,
Plaintiffs,
v.

PHIL KEISLING,
SECRETARY OF STATE OF OREGON,
Defendant.

Civil No. 98-1372-AA

1999 U.S. Dist. LEXIS 22727

United States District Court
for the District Of Oregon

March 22, 1999

COUNSEL: John DiLorenzo, Jr., Aaron K. Stuckey, Hagen, Dye, Hirschy & DiLorenzo, P.S., Portland, Oregon, for plaintiffs.

M. Miller Baker, Brian M. Tauscher, Charles R. Spies, Carr Goodson Lee & Warner, Washington, D.C., for plaintiffs.

Patrick M. McSweeney, McSweeney, Burtch & Crump, Richmond, Virginia, for plaintiffs.

Hardy Myers, Attorney General, Stephen K. Bushong, Assistant Attorney General, Department of Justice, Salem, Oregon, for defendant.

JUDGES: Ann Aiken, United States District Judge.

AIKEN, Judge:

BACKGROUND

With the passage of Ballot Measure 60, overwhelmingly approved at the November 3, 1998 election, Oregon became the first state to adopt a vote-by-mail system for all statewide elections. For regular elections for United States Representative, United States Senator, and Presidential Elector, Oregon permits voters to cast their votes 20 days prior to the general federal election day in November ("election day"), even if such voters are able to vote on election day.

Plaintiffs are Voting Integrity Project, Inc., a nonprofit, nonpartisan public-interest corporation based in Arlington, Virginia, and several individual registered voters in Oregon. Plaintiffs move for summary judgment arguing that this early voting by voters otherwise able to vote on election day violates 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1, which establishes election day as the exclusive day throughout the United States for balloting for United States Representatives, United States Senators, and Presidential Electors. Plaintiffs also challenge Or. Rev. Stat. § 253.030(5) which allows Oregon voters to make their absentee status "permanent" until the elector notifies the clerk or is no longer an elector of the county.

Plaintiffs rely on 42 U.S.C. § 1983 for relief arguing that because defendant Keisling enforces the challenged Oregon statutes, he is subject to an injunction under § 1983. Section 1983 provides a cause of action for violations of federal statutes. *See Maine v. Thiboutot*, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980).

Defendant Phil Keisling, the Secretary of State of Oregon, moves for cross-summary judgment arguing that while Oregon may have changed the time, place, and manner in which ballots are cast, Oregon has not changed the day of the election, and therefore, has not violated federal law.

Defendant's motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied.

STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Electrical*, 809 F.2d at 630.

DISCUSSION

(1) Vote by Mail - Ballot Measure 60

The Elections Clause of the United States Constitution, Art. I § 4, cl. 1 establishes uniform rules for federal elections. Acting pursuant to constitutional authority, in 1945 Congress enacted 3 U.S.C. § 1, which provides:

> The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

Id.

In 1872 Congress enacted 2 U.S.C. § 7, which provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress

> commencing on the 3d day of January next thereafter.

Finally, following ratification of the Seventeenth Amendment (providing for the direct election of Senators), Congress exercised its Elections Clause authority to establish a uniform national election day for Senators:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3rd day of January next thereafter.

2 U.S.C. § 1. By linking the election of United States Senators under this section with the election of United States Representatives, Congress mandated that all elections for congressional representation be held on election day.

By state law, election day in Oregon for the regular election of Oregon's United States Representatives, Senators, and Presidential Electors occurs on the Tuesday following the first Monday in November in even numbered years. OR. CONST., Art. III, § 14; OR. REV. STAT. § 254.056.

Under Measure 60 ballots will be mailed to all registered voters in Oregon not sooner than twenty days,

and not later than fourteen days, before election day. OR. REV. STAT. § 254.470(3)(a). Each county election official is required to designate at least two official sites for ballot deposit in statewide elections. Most counties have more than the required two sites. Ballots may be returned by voters through the mail, or delivered in person, to the official site or sites for ballot deposit for each county. OR. REV. STAT. § 254.470(8). Ballots must be received at an official site for ballot deposit by 8:00 p.m. on election day in order to be processed and tallied. As written, Oregon voters may cast their votes for United States Representatives, United States Senators, and Presidential Elector, by mail or other return of their ballot, beginning twenty days before the election day, even if such voters are fully able to vote on election day.

Although ballots may be deposited at an official site for ballot deposit before election day, ballots cannot be tallied until election day, regardless of when they are deposited. Most ballots are tallied through a "vote tally system," which involves one or more pieces of equipment that examine marked or punched ballots automatically (commonly known as a "ballot counting machine"). Regardless of the system used to tally ballots, the tally cannot begin before election day. Election results cannot be released until after 8:00 p.m. on election day.

As an alternative to depositing ballots at the official site for ballot deposit, any voter may choose to obtain and cast a ballot on election day in person at the county elections office. As a result, voting "in person" on election day will still occur in Oregon under Measure 60, albeit at fewer polling places.

Plaintiffs argue that because Oregon's early voting statutes conflict with federal law, they are unconstitutional under the Supremacy Clause and must yield. The Supremacy Clause of the United States Constitution provides that "the Constitution and the laws of the United States shall be the Supreme Law of the Land." U.S. CONST. Art. VI, § 2. "If a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co. v. Wickham*, 382 U.S. 111, 120, 15 L. Ed. 2d 194, 86 S. Ct. 258 (1965).

Plaintiffs argue that Oregon's early voting system ignores federal law's formulation for an exclusive election day, supplanting it with an extended election commencing in October (for "permanent" absentee ballots) during which voters mark and return their ballots. Plaintiffs conclude that such early voting completes, for Oregon voters, the final act of selecting an office holder, and thwarts the congressional purpose of national uniformity in the time of balloting.

I disagree. State laws are deemed to conflict with federal law, "either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives." *Northwest Cent. Pipeline v. Kan. Corp. Comm'n*, 489 U.S. 493, 509, 103 L. Ed. 2d 509, 109 S. Ct. 1262 (1989) (citations omitted). In the absence of some "conflict" state election laws are to be upheld, because states "are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives." *United States v. Classic*, 313 U.S. 299, 311, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941); *see also Smiley v. Holm*, 285 U.S. 355, 366, 76 L. Ed. 795, 52 S. Ct. 397 (1932) (constitution vests state legislatures with

"the authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of votes, prevention of fraud and corrupt practices, counting votes, duties of inspections and canvassers, and making and publication of election returns").

Federal law establishes the Tuesday after the first Monday in November as "the day for the election." 2 U.S.C. § 7. Thus, Oregon's vote-by-mail law can be found to "conflict" with federal law only if the vote-by-mail law changes the "the day for the election." With respect to presidential and vice-presidential elections, the statutory language states that "the electors" of president and vice-president "shall be appointed" on election day. 3 U.S.C. § 1. That statute on its face does not prevent voters from casting their ballots early, as long as the electors to the Electoral College are not "appointed" until election day. Because votes are not tallied until election day, "appointment" of electors cannot possibly occur in Oregon before election day.

A candidate is not "selected for office" at the time a voter deposits a completed ballot in the ballot box, regardless of whether the ballot is deposited at a polling place on election day, in the mailbox, or at an official site for ballot deposit on or before the designated day. Providing various options for the time and place of depositing a completed ballot does not change "the day for the election."

Further, the objectives of a uniform election day are still met under Oregon's vote-by-mail law. The results in Oregon cannot influence elections in other states because Oregon votes are not tallied until election day. The burden on states may actually be less if the election is conducted by mail. Plaintiffs do not allege or submit any evidence suggesting that vote-by-mail will increase the likelihood of fraudulent multiple voting. And vote-by-mail, like absentee voting, does not conflict with the primary purpose of the Elections Clause.

Plaintiffs acknowledge that Oregon's laws "contemplate holding an election on Federal Election Day[.]" Plaintiffs' Reply at p. 5. Allowing some electors to mark their ballots and deposit them in the mail or at an official deposit site before election day does not change "the day for the election." If it did, then all state absentee ballot laws would be preempted by federal law. All absentee balloting laws allow the federal election to "begin" by permitting early voting before election day. Thus, if plaintiffs are correct, not only would Oregon's vote-by-mail and absentee balloting laws be preempted by federal law, but so would the absentee ballot laws in all 50 states - not just the state laws that allow voters to cast absentee ballots without first making some showing of an inability to vote in person.

Finally, plaintiffs' reliance on *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464, 139 L. Ed. 2d 369 (1997), is misplaced. There, the Court struck down Louisiana's "open primary" statute, which resulted in the "election" of United States Senators and Representatives for Louisiana in October of a federal election year in more than 80% of the contested congressional elections since the system went into effect in 1978. 118 S. Ct. at 466. Specifically,

Louisiana's "open primary" provides an opportunity to fill the offices of United States Senator and Representative during the month of October without any action to be taken on federal election day. *Id.* (emphasis added).

The Court held,

> While true that there is room for argument about just what may constitute the final act of selection within the meaning of the law, our decision does not turn on any nicety in isolating precisely what acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute. Without paring the term 'election' in § 7 down to the definitional bone, it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates § 7.

Id. at 467-68 (footnote omitted)(emphasis added).

The Court added, "This case thus does not present the question of whether a State must always employ the conventional mechanics of an election. We hold today only that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 468 n.4. That is not the case here. Unlike *Foster*, Oregon's laws do not enable an election to be "consummated" prior to election day, "without any action to be taken" on election day. *Id.* at 466.

Further, the Court in *Foster* found it unnecessary to pare the term 'election' in § 7 "down to the definitional bone." *Id.* at 467. This court similarly finds it unnecessary and therefore declines plaintiffs' invitation to do so. For our purpose, Oregon's laws meet enough of the requirements of federal election laws so as to not violate or conflict with those laws. Specifically, there are enough acts done on election day to satisfy the requirements of federal law. See p. 5-6 of this opinion.

Unlike Louisiana's system in Foster, elections for federal office under Oregon's vote-by-mail system are not "concluded as a matter of law" or "consummated" before election day. To the contrary, elections under Oregon's vote-by-mail law are concluded as a matter of law on election day.

(2) Absentee Voting - Or. Rev. Stat. § 253.030(5)

Plaintiffs find similar fault with Or. Rev. Stat. § 253.030(5) which allows voters to cast votes for United States Representative, United States Senator, and Presidential Elector earlier than election day. Or. Rev. Stat. § 253.015 states, "An elector may become an absent elector when the elector has reason to believe that the elector will be unable for any reason to vote at the election." *Id.* At the voter's option, Or. Rev. Stat. § 253.030(5) makes the absentee status permanent, even if the voter is otherwise able to vote on election day: "If an elector desires, the elector's application shall be valid for every subsequent election until the elector otherwise notifies the clerk or is no longer an elector of the county." *Id.* Plaintiffs are not challenging Or. Rev. Stat. § 253.015, which permits absentee balloting in advance of the election by voters who certify their belief that they will be

unable to vote on election day, nor do plaintiffs challenge Oregon's statutes permitting absentee balloting by "long term absent electors." *See* Or. Rev. Stat. § 253.500 *et seq.*

The absentee ballot law, Or. Rev. Stat. § 253.030(5), does not conflict with federal election laws. An elector's application for an absentee ballot effectively certifies the elector's "belief" that he or she will be "unable" to vote in person. Section 253.030(5) merely continues that certification as presumptively effective for subsequent elections unless the elector decides otherwise. The reason the voter believes he or she will be unable to vote in person does not matter. A voter may thus be "unable" to vote in person if the voter chooses not to do so. Thus, plaintiffs' attempt to distinguish between Or. Rev. Stat. § 253.015 (which they do not challenge) and Or. Rev. Stat. § 253.030(5) is unfounded. Both statutes effectively signify the elector's belief that he or she will be unable to vote in person on election day.

Further, nothing in federal law limits absentee voting to persons who can make some showing of an inability to vote at the polling place on election day. Specifically, I find no such requirement in 2 U.S.C. §§ 1, 7 or 3 U.S.C. § 1.

In sum, I find no conflict between Or. Rev. Stat. § 253.030(5) and federal election [*16] laws. It is not "impossible" to have an election day while also allowing voters to vote by absentee ballot for any reason whatsoever. Doing so is not an "obstacle" to the accomplishment of the objectives of the Elections Clause and the federal election laws.

CONCLUSION

I agree that this court is not the appropriate forum to debate the policy reasons for and against Oregon's election laws. Instead, the issue is a narrow one, whether federal law preempts the challenged Oregon statutes. The matter is one of legal interpretation and definition. I find no conflict between either Oregon's vote-by-mail law or its "permanent" absentee statute and federal election statutes. The voting laws at issue here do not make it impossible to comply with federal law as they do not change "the day for the election." Election day will still occur in Oregon on the Tuesday after the first Monday in November. Polling places will still be open across the state until 8:00 p.m. on that day. Voters can still cast their ballots in person on election day. Votes will still be tallied on election day, and not before. In short, Oregon's laws have not changed the "day of election."

Further, Oregon's laws do not subvert any of the purposes of the federal election laws, which ensure that the election results from one state do not influence elections in other states, preventing voters from voting twice in the same election, and avoiding the burden of requiring states to hold multiple elections in a single election year.

Plaintiffs' motion for summary judgment (doc. 7) is denied, and defendant's cross-motion for summary judgment (doc. 17) is granted. This case is dismissed and all pending motions are denied as moot.

Dated this 22 day of March 1999.

Ann Aiken
United States District Judge

JUDGMENT

This action is dismissed.